IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 118.

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,

v.

NATIONAL BROADCASTING COMPANY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR NATIONAL BROADCASTING COMPANY, INC.

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January 25, 1954.

Pandick Press, Inc., 22 Thomas St., New York 6, N. Y., U. S. A.

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BRIEF FOR NATIONAL BROADCASTING COMPANY, INC.

Opinions Below.

The majority and dissenting opinions (R. 110) of the District Court are reported *sub nom. American Broadcasting Co.* v. *United States,* 110 F. Supp. 374 (S. D. N. Y. 1953). The Report and Order of the Federal Communications Commission here in issue have not been officially reported; they can be found in Pike & Fischer, *Radio Regulation,* Vol. 1, Part 3, page 91:231. They are attached to the NBC Amended Complaint as Exhibit B (R. 161).

Jurisdiction.

The final judgment of the Court below was entered on March 11, 1953. A petition for appeal therefrom was filed by the Federal Communications Commission on May 8, 1953, and the appeal was allowed on the same day. On October 12, 1953, this Court noted probable jurisdiction (R. 307). The jurisdiction of this Court on this appeal rests on Title 28 U. S. C. §§ 1253 and 2101(b).

Questions Presented.

The Order of the Federal Communications Commission here involved provides that all applications in connection with the operation of a broadcast station (including license renewal applications) will be denied if the applicant "proposes to follow or continue to follow" a practice of allowing the broadcast of certain defined types of programs. The intent and effect are admittedly to prohibit the broadcast of such programs.

The programs principally under attack are contest programs in which some of the contestants are drawn from the broadcast audience. Those in which the home contestants participate by telephone are frequently referred to as "telephone giveaways." The Commission has taken the view that these programs constitute violations of Section 1304 of the Criminal Code, Title 18 U. S. C., which prohibits the broadcast of lottery information. The Court below held that these particular programs were not in violation of the statute and enjoined enforcement of that portion of the Order (subdivisions (2), (3) and (4) of paragraph (b)) specifically designed to embrace them; it upheld the Order in all other respects, however, thus holding that the Commission has the authority to enforce Section 1304 by use of its licensing powers.

The first question presented therefore on this appeal by the Commission is:

> Whether the radio and television contest programs here under attack constitute lotteries under Section 1304 of the United States Criminal Code.

The effect of the decision below was to hold all of the programs actually involved in the present actions to be legal, and therefore, neither NBC nor the other networks appealed from that portion of the decision below which upheld the right of the Commission to adopt rules of this character and which found that paragraphs (a) and (b)(1) of the Order were proper. The Commission takes the position in its brief that the questions determined in its favor below are no longer open (FCC Br. pp. 19-20). It is respectfully submitted, however, that the Commission's appeal necessarily presents those questions for decision. Obviously this Court cannot reverse the judgment appealed from for the purpose of enlarging the scope of the Order unless it agrees that the Order in its entirety is a proper exercise of the Commission's authority. The additional question presented by these appeals, so considered, is:

> Whether the Commission has the power to decide that certain types of radio and television programs are illegal and forbid their broadcast.

Statutes Involved.

Sections 4(i), 303(r), 307(a), 308(b), 309(a) and 326 of the Communications Act of 1934, as amended (48 Stat. 1064 *et seq.;* 50 Stat. 189; 60 Stat. 1352; 63 Stat. 108; 47 U. S. C. §§ 151 *et seq.*); and Sections 1301-5 of the United States Criminal Code (Title 18 U. S. C. §§ 1301-5) are set forth in Appendix A hereto.

Statement.

A. The Order.

The Order involved in this appeal was adopted on August 18, 1949. Its enforcement has been suspended pending the final decision of this Court. Only four of the seven members of the Commission participated in the decision and one of the four dissented, so that the Order is actually the work of a minority of the Commission.

The text of the Order follows, with the portion underlined which was stricken by the Court below. The portion of paragraph (a) which is within the single quotation marks is the language of Section 1304 of the Criminal Code; paragraph (b) contains the Commission's interpretation of that language.

> "Lotteries and Give-Away Programs—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting 'the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.' (See U. S. C. § 1304).
>
> "(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any

person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

"(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

"(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

"(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

"(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question."

B. Programs Affected.

The Commission has made it clear in this proceeding that it is primarily attacking certain types of contest programs generally referred to as "telephone giveaway"

programs. The language of the Order was ambiguous and broad enough to cover also a type of contest program commonly referred to as "studio giveaways", but the Commission's staff has taken the position that this was not intended, and references to such programs in NBC's Amended Complaint have therefore been stricken (R. 118, 239).

The distinguishing feature of the telephone giveaway program is the home participation of members of the broadcast audience in contests conducted with the assistance of the telephone. The contest participants are generally chosen in part by lot, there being no other practicable means of selection, and prizes are awarded for successful performances.

The NBC Amended Complaint describes in paragraph 15 a typical television program coming within the terms of the Order (R. 151-2). A transcript of one broadcast of the program is Exhibit E to the NBC Amended Complaint (R. 198 *et seq.*).

This program, which is known as "What's My Name?", is a variation of a familiar parlor game in which famous persons are identified on the basis of clues supplied to the participants. In the broadcast version, all but one of the participants in the game are chosen from persons in attendance at the studio. Each person so chosen is given an opportunity to win a prize if he is successful in identifying a prominent personality from clues contained in a skit performed by the entertainers on the program.

The program also provides for the participation of one listener by means of long distance telephone. This listener is chosen at random from postcards sent in by listeners bearing their names and telephone numbers. If the person who is called answers the telephone he receives a watchband manufactured by the sponsor of the program and is also given the opportunity to win a "jackpot" prize by

identifying a person from clues given in the course of the program. The contest is held and all clues are given after the contestant is selected by telephone (so that he can even tune in the program after this selection) and after his identity is announced to the audience.

C. The Decision Below.

The three-judge District Court upheld the right of the Commission to promulgate rules with respect to this subject matter. It held, however, that the specific paragraphs of the Order which would have the practical effect of defining *all* telephone giveaway programs as lotteries are an incorrect interpretation of the law, and that their enforcement would be a form of censorship and a violation of the First Amendment. It therefore restricted the application of the rules to contest programs requiring contestants to contribute "any money or thing of value."

This is the portion of the final judgment entered below from which the Commission has appealed. Since their specific programs involved were upheld, no appeal was taken by the plaintiff networks. The United States itself, represented by the Department of Justice (the agency directly charged with the enforcement of the criminal laws), has not appealed; the Commission accordingly is prosecuting the present appeal alone.*

D. Earlier Attempts to Ban Giveaways.

Giveaway programs in one form or another have been broadcast for a good many years. The affidavit of G. B. Zorbaugh filed in support of ABC's motion for summary

* The failure of the Department of Justice to take an appeal on behalf of the United States gains importance from the emphasis placed by the dissenting judge below, Judge Clark, on the fact that the Department of Justice in the District Court was supporting the Commission's interpretation of the criminal statute (110 F. Supp. at 319).

judgment annexes a series of letters sent in 1940 by Mr. James L. Fly, then Chairman of the Commission, to the Attorney General of the United States (Exhibits E-1—J-2; R. 30-63). Mr. Fly specifically referred to former Section 316 of the Communications Act of 1934, which prior to the adoption of the United States Criminal Code contained the statutory provisions prohibiting the broadcast of lottery information. He suggested that criminal proceedings might be instituted against a number of stations because of their broadcasting giveaway programs.

The exhibits to the Zorbaugh affidavit also include with Chairman Fly's letters material forwarded to the Attorney General descriptive of the programs. A study of this descriptive material shows that these programs were in all respects similar to those against which the present Order is directed. For example, the program known as "Dixie Treasure Chest" (Ex. F1, R. 42-46) would plainly be in violation of subparagraphs (b) (2) and (b) (3) of the Order.

The Attorney General declined to take any action with respect to "Dixie Treasure Chest" or any of the other programs and so advised Mr. Fly by letter (R. 41-2, 46, 48-9, 52, 53).

In a letter dated December 30, 1943, Mr. Fly called the attention of the Chairman of the Interstate Commerce Committee of the United States Senate to the Commission's views concerning telephone giveaways. The letter requested an amendment to Section 316 of the Communications Act which would have retained the existing language as to lotteries, but would have added new language specifically prohibiting the broadcast of "any programs which offer money, prizes, or other gifts to members of the radio audience (as distinguished from the studio audience) selected in whole or in part by lot or chance." Mr. Fly

explained that, in his view, these programs were "not good broadcasting", but that the present statute was inadequate to prohibit them. A copy of this letter is attached to the Zorbaugh affidavit as Exhibit D (R. 27-30). The proposed amendment to Section 316 was never adopted.

The next step taken by the Commission against give-away programs in general was the issuance of the original Notice of Proposed Rule-Making in this proceeding. In this Notice, the Commission cited Section 316 of the Communications Act as authority for its adoption of the proposed rules (R. 157). When it was called to the Commission's attention that Section 316 had been repealed prior to the Notice, its place being taken by Section 1304 of the Criminal Code, 18 U. S. C., the Commission issued a Supplemental Notice of Proposed Rule-Making (R. 159). In the Supplemental Notice the Commission states that its authority for issuing the proposed rules is to be found in Sections 4(i), 303(r), 307(a), 308(b) and 309(a) of the Communications Act of 1934 as amended. These sections contain the general rule-making and licensing powers of the Commission.

Paragraph 18 of the NBC Amended Complaint (R. 153), admitted to be correct by stipulation between the parties (R. 145), states that:

> "18. The Commission did not have before it in the record on which it acted any evidence that these or any similar programs were contrary to or adversely affected the public interest, or that the broadcast licensees broadcasting such programs were of bad character or otherwise unfit to hold such licenses. The Commission made no finding that any of the programs coming within the terms of the Order was contrary to or adversely affected the public interest except in so far as they may violate Section 1304 of the United States Criminal Code."

After the promulgation of the Order, the present litigation followed. Its chronology is set forth in the Commission's brief at pages 5 and 6.

Summary of Argument.

I. An extensive body of law has developed as to the nature and elements of the lotteries prohibited in varying terms by statutes of the United States and every state. Regardless of the terms of the statutes the cases are agreed that the elements of a lottery are "prize", "chance" and "price" (or "consideration"). The overwhelming majority of the cases, moreover, stand squarely for the proposition that no contest is a lottery unless the price which it requires is, in substance if not in form, an actual payment of money or its equivalent by the contest participants; formal or technical "consideration" in the contract sense would not be sufficient. Contrary to this very great weight of authority, a few cases have held that to require participants to come to a place of business where sales of the promoter's merchandise are likely (but not required) to be made to the participants is a sufficient substitute. Not a single case, however, has ever found that the equivalent of a lottery price is paid by a contestant who is required only to give, in his own home, attention to a contest program. Not a single case has suggested that exposure of a contestant in his own home to advertising is the equivalent of buying the commodity advertised. The Commission's Order cannot be supported without taking this additional step beyond all the decided cases.

The Commission's suggestion that its ban on telephone giveaway programs should be upheld either because they involve an appeal to the "gambling spirit" or because they produce profits for the broadcasters and sponsors is

indefensible in theory and not justified by the actual scope of the criminal statute which the Commission claims to be interpreting. The Commission is actually attempting to impose upon the broadcasting industry its own views of what is "good broadcasting"; views which it has urged unsuccessfully in the past, both as grounds for criminal prosecution and as grounds for amending the criminal statutes. If the Commission's Order is upheld in its entirety a whole class of programs—all those programs involving audience participation in contests—will be arbitrarily and unjustifiably banned.

II. The language of definition in Section 1304 of the Criminal Code which the Commission's Order purports to interpret was adopted verbatim by Congress in 1934 from the postal lottery statutes. In the postal lottery statutes that language had been unchanged since 1909 and before that had existed in substantially the same form since 1890. A well-established judicial interpretation had been placed on the postal lottery statutes as prohibiting only schemes which were designed to make participants pay a valuable consideration. It seems clear that Congress intended the identical language to be identically interpreted in the field of broadcasting. Both the consistent administrative interpretation by the Post Office Department of this language and the failure of Congress on request to amend it support the established judicial interpretation. It would be improper to change that interpretation without affirmative legislative action.

III. The Commission's present appeal, by asking that the scope of its Order as approved below should be enlarged, necessarily presents to this Court all those arguments properly urged against the Order below. The principal

questions relate to the interpretation of Section 326 of the Communications Act and to the Commission's power to act on the basis of unadjudicated violations of the criminal law.

It is submitted that Section 326 of the Communications Act in accordance with its plain terms should be interpreted as forbidding the use by the Commission of its general licensing powers to accomplish the results of censorship, even if the censorship attempted would be constitutional since in aid of a valid criminal statute. For the Commission to prohibit broadcasts not otherwise prohibited under the lottery broadcasting laws would moreover violate the First Amendment. The congressional mandate to prevent lottery broadcasts should be construed as deliberately withheld from the Commission and directed solely to the Department of Justice. In the absence of any authority from Congress to act in this field, the Commission cannot rely on unadjudicated violations of criminal statutes as providing the basis for an exercise of its general powers.

ARGUMENT.

I.

The Commission's ban on giveaway programs goes beyond the farthest reach of any lottery case yet decided, and is based on an erroneous interpretation of the terms used in Section 1304 of the Criminal Code.

No clearer statement of the nature of a lottery has been made than the definition by Judge Qua in *Commonwealth* v. *Wall*, 295 Mass. 70, 72, 3 N. E. 2d 28, 29-30 (1936):

> "We agree with the defendant that the essence of a lottery is a chance for a prize for a price. [Citations omitted] * * * One may give away his money by chance, and if the winner pays no price, there is no lottery. 'Price' in this connection means something

> of value and not the formal or technical consideration which would be sufficient to support a contract. [Citations omitted]."

Section 1304 of the United States Criminal Code prohibits the broadcast of lottery information; other provisions prohibiting or penalizing lotteries have long been part of the law of the United States and of most of the states. The state statutes against lotteries vary somewhat in their language but this fact has not prevented the development of a body of case law of an almost common-law quality.

The Commission's brief conveys an accurate impression of the size of this body of case law. It fails, however, to disclose that not a single case in this great mass actually holds that any lottery statute can be violated (as the Commission argues) when participants or contestants are asked to do nothing more than give their attention to a broadcast as the price for their chance to win a prize.

In fact, this case law is substantially unanimous that the three essentials of a lottery (regardless of the language of the statutes being enforced) are "prize", "chance", and "price" (or "consideration"). When any of these three elements is absent, a contest is not to be considered a lottery. See, *e.g.*, *Post Publishing Co.* v. *Murray*, 230 Fed. 773 (1st Cir. 1916), *cert. denied*, 241 U. S. 675 (1916) (no consideration); *Eastman* v. *Armstrong-Byrd Music Co.*, 212 Fed. 662 (8th Cir. 1914) (no chance).

Even the Commission in the Report which it issued in connection with the adoption of the Order paid lip service to this rule. The Commission said:

> "• • • the proposed rules all deal with situations which contain in *some manner* all of the three elements of prize, chance and *some form* of consideration, which had been held by the courts to be

> the essential features of lotteries * * *." (Emphasis added) (R. 167)

The element here in issue is the element of "price", or "consideration." It is, under all the cases, a necessary element of a lottery, just as at common law delivery is a necessary part of a gift. When a money payment or its equivalent is required of each participant, consideration is present in the lottery sense. The cases are not in full agreement as to the extent to which it can be supplied by anything less. Some find that payment of money by one group of the contestants, while another group pays nothing, satisfies the requirement. A very few cases find that visits to the promoter's store, with the accompanying chance for the promoter to attempt a sale, satisfies the requirement. Not a single case has ever found that a lottery price is paid by a contestant being required to give, in his own home, attention to a contest program. Not a single case has suggested that exposure of a contestant in his own home to advertising could be considered the equivalent of buying the commodity advertised.

A. The Role of Price in Various Types of Lotteries.

The Commission cites 130 cases in its brief. By treating every decision that a lottery existed as if it were an authority that a lottery exists on the very different facts present here, and by taking language stimulated by particular situations as if it were applicable to all situations, the Commission seeks to create the illusion of a considerable body of authority in its favor. In reality, however, the overwhelming weight of authority is squarely in support of the decision below. Not a single federal decision conflicts with it and the only two dissents from the point of view which it embodies that have ever been voiced by a federal judge were both by Judge Clark (in the instant case,

and in *Garden City Chamber of Commerce* v. *Wagner*, 192 F. 2d 240 (2d Cir. 1951)). In both cases Judge Clark was unable to persuade his colleagues, Judges A. N. Hand and Chase in the *Garden City* case, and Judges Leibell and Weinfeld in the instant case.

The prohibition of Congress against any "lottery, gift enterprise or similar scheme" is limited by the legal meaning of the terms used. The effect of the case law is that this meaning includes only situations in which the participants are required to give a valuable consideration. The first lesson of the cases is that they have dealt with the concept of lottery consideration in at least four differing states of fact, and their holdings and dicta must be read in the light of their different facts.

The four situations, briefly, are:

1. The "sweepstakes" lottery.
2. The "gift enterprise"—in which a chance is "given" to each purchaser of a commodity.
3. The "gift enterprise" in which some (not all) of the chances are given to persons not purchasing anything.
4. The scheme in which free chances are distributed in such a way as to require attendance at a place of business where sales may be made, but without direct tie-ins between the chance and the sale.

These situations (none of which would include the instant case) must be discussed in more detail, with particular attention to the cases in the last two classifications.

1. The Sweepstakes Lottery.

"Sweepstakes" and "raffles" and similar enterprises, in which tickets are sold and prizes are awarded among the ticketholders by lot, are of course well known.

As to them, there has never been any conflict of opinion or authority; such enterprises are lotteries. The cases involving them (such as *Stone* v. *Mississippi*, 101 U. S. 814 (1879), FCC Br. p. 36) have dealt only with the question of whether they can properly be prohibited. Such cases, whatever the strength of their language as to the evil of lotteries, are no authority one way or the other as to whether the contest programs here involved are lotteries.

It was this type of lottery that was dealt with by the "Select Committee of 1808" and by the Royal Commission Report of 1933, from which the Commission's brief draws the inference that these British legislative bodies would condemn radio and television contest programs (FCC Br. pp. 31-2). The legislative history of lottery prohibitions in this country cited in the Commission's brief also is concerned with this kind of lottery. It is not surprising that the pernicious effects of the "gambling spirit" are so often and strongly denounced. It is only surprising that the Commission is suggesting that such denunciations are equally applicable to radio and television contest programs.

2. The Gift Enterprise.

"Gift enterprise" was a term early applied to a scheme in which the chance was delivered "free" as a concomitant of merchandise purchased by the contestant. The promoters of such schemes argued that since the merchandise was "worth" the entire sum paid, the chance must be considered to be free.

If value is conceived of as a fixed quantity, this argument seems plausible. Recognition that value is relative, however, and that (in accordance with ordinary accounting principles) a part of the price paid is necessarily allocable to the chance, solves this difficulty, by showing

that the "gift enterprise" is simply a form of the "sweepstakes" lottery. The courts are in general agreement that the sale of merchandise to which is attached the "free" chance for a prize is illegal. Nor is any substantial change in the gift enterprise accomplished by having the promoter distribute a few free chances to persons selected by himself, and such devices have been held to be lotteries. See *State* v. *Danz,* 140 Wash. 546, 548, 250 Pac. 37, 38 (1926) where the court put the case:

> "If in the flourishing days of the Louisiana lottery its management had advertised that it would give a free ticket to the president of every bank in the city of New Orleans, that would not have changed the scheme from a lottery, whether or not any one or all of such free tickets were accepted."

One of the cases of the "gift enterprise" type is *Horner* v. *United States,* 147 U. S. 449 (1893). There the Supreme Court held that certain bonds of the Austrian Government involved lotteries, and as such could not use the mails. The bonds were to be redeemed in a manner determined by lot, the element of chance to determine both the redemption price and the time of payment. A few of the bonds were to be redeemed soon after issuance at very high premiums, while the rest of the bonds would be paid off only at their principal amount plus "a very small rate of interest upon that principal" (147 U. S. at 461), and some of the bondholders would not get their money back until the end of fifty-five years.

The defendant argued that the bonds could not constitute a lottery since all of the bonds would eventually be paid off with interest. The Court rejected this argument, perceiving clearly that, "Whoever purchases one of the bonds, purchases a chance in a lottery, or, within the language of the statute, an 'enterprise offering prizes depend-

ent upon lot or chance.' The element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter" (147 U. S. at 459). Thus the Court recognized that this was a situation where the bondholder actually "purchased" his chance. He paid part of his money for the feature of the bond that depended upon chance, just as he paid part for the feature that was certain. The court referred to the "appeal to the cupidity of those who had money" (147 U. S. at 459; FCC Br. p. 38), but such a case obviously is no more an authority that broadcast contest programs are lotteries than it is an authority that all "appeals to cupidity" are crimes. Indeed, the reasoning of the *Horner* case fully supports the decision of the court below that the crucial test of a lottery is whether a price is paid for the chance.

The "gift enterprise" type of lottery has not been confined to situations where chances were given together with merchandise purchased by participants, but has extended also to theatre promotional schemes involving chances given to the ticket buyers, which are equally illegal. *E. g., Society Theater* v. *Seattle,* 118 Wash. 258, 203 Pac. 21 (1922); see also Appendix B.

3. Gift Enterprises with Opportunity for "Free" Chances.

The next stage of the analysis concerns situations in which a variation was introduced into the "gift enterprise" scheme by adding to the opportunity for obtaining a chance without any payment whatever. Of these cases the great bulk have concerned theatre promotional schemes, the most familiar being called "Bank Night." A tabulation of such cases classified according to the analyses offered by the courts is annexed to this brief as Appendix B.

The "free-play" Bank Night scheme allowed persons to qualify for a prize by entering their names on a register

in the lobby of a theatre and by standing outside while the drawing was in progress. One could also qualify by buying an admission ticket. The winning numbers were announced from the stage and at the entrance to the theatre.

Some decisions as to Bank Night held that the free-play device was merely a subterfuge. *E. g., Kessler* v. *Schreiber,* 39 F. Supp. 655 (S. D. N. Y. 1941). Other courts reasoned that the paying patrons of the theatre clearly paid in part for the chance. *E. g., State* v. *Greater Huntington Theatre Corp.,* 133 W. Va. 252, 55 S. E. 2d 681 (1949). In other cases the participants were viewed collectively as a group and held to have paid a price for their chance. *E. g., Barker* v. *State,* 56 Ga. App. 705, 193 S. E. 605 (1937); *Willis* v. *Young,* [1907] 1 K. B. 448, a newspaper promotion case, adopted this theory (contrary to the implication of the discussion in the Commission's brief at page 53). Still other courts found that consideration was supplied by those theatre patrons who would not have bought tickets but for the existence of the chance, and evidence that there were such was found in the increased gate receipts on Bank Night. *E. g., Grimes* v. *State,* 235 Ala. 192, 178 So. 73 (1938). All such approaches, of course, lead to condemning the enterprise. It is important to note that the implication of each approach is that without the payment of valuable consideration by some or all of the participants there would be no lottery. These decisions are therefore fundamentally inconsistent with the position taken here by the FCC.

Many courts have in the course of their opinions inveighed against the evils of lotteries.* A few have used

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* The absurdity of relying on such dicta as if they defined the scope of the statute is illustrated in *Iris Amusement Corp.* v. *Kelly,* 366 Ill. 256, 267-8, 8 N. E. 2d 648, 653 (1937), where the court listed among those evils not only cupidity, envy, jealousy and temptation, but also the obstruction of traffic in the streets.

language of contract law speaking of benefits to the promoter and "legal detriment" to persons standing in the street as constituting legal consideration, not mentioning that analysis of the facts would actually disclose valuable consideration to be present.

All of these cases deal with a situation in which by any conceivable test a far more tangible price is paid for the chance than in the broadcast contest programs which the Commission wishes to ban. The real controversy is over the effect of the fact that a few contestants did not pay, although most did. Obviously cases holding such enterprises to be lotteries are no authority whatsoever in support of the Commission's argument here, as to programs in which no contestant pays, and it would be a mistake to apply their language indiscriminately to facts much different from those before the courts.

On the other hand, the very substantial number of cases which have held Bank Night and similar enterprises to be legal are strong and direct authority against the Commission. See, *e. g., Albert Lea Amusement Corp.* v. *Hanson,* 231 Minn. 401, 43 N. W. 2d 249 (1950); *Darlington Theatres* v. *Coker,* 190 S. C. 282, 2 S. E. 2d 782 (1939); *Dorman* v. *Publix-Saenger-Sparks Theatres, Inc.,* 135 Fla. 284, 184 So. 886 (1938). To the courts which reached these decisions, the instant case would obviously present an *a fortiori* situation.

Commonwealth v. *Wall,* 295 Mass. 70, 3 N. E. 2d 28 (1936), points out that the test is a purely factual one as to whether the chance is genuinely "free" or sold for a price and logically treats it as a jury question. Whichever way courts decide this factual question, the necessity to decide it demonstrates an agreement of principle that the

scheme is not a lottery unless a valuable consideration is present.

4. Schemes in which Free Chances are Distributed in Such a Way as to Require Attendance at a Place of Business where Sales may be Made, but without Direct Tie-Ins between the Chance and the Sale.

The next and last group of cases involves business promotional campaigns which bring participants to the sales place of the promoter but do not require purchases by them. The better and far more numerous authorities hold the campaigns not to be lotteries.

Garden City Chamber of Commerce v. *Wagner,* 100 F. Supp. 769 (E. D. N. Y. 1951), *petition for stay dismissed on opinion of court below,* 192 F. 2d 240 (2d Cir. 1951), was such a case. There the merchants of Garden City mailed numbered postcards. The recipient of a card might claim a prize by window-shopping at the various stores of the participating merchants and discovering an article of merchandise in the window bearing a number corresponding to the number of his card. The Postmaster banned the postcards from the mails on the ground that the scheme constituted a lottery in violation of the postal lottery statutes, the language of which parallels the statute in issue in the instant case. On suit being brought by the Garden City Chamber of Commerce, the United States District Court held that the scheme was not a lottery, and that the postcards must be accepted as mailable, since the element of consideration was lacking. The case came before the Court of Appeals on motion of the Government for a stay. The court denied the motion for the reasons stated in the opinion below. Thereafter, the Government dropped its appeal, which is not surprising in view of the fact that both the majority memorandum and

the dissenting opinion indicate that the decision on the motion had been made on the basis of a determination that the appeal was without merit.

In *People* v. *Burns,* 304 N. Y. 380, 107 N. E. 2d 499 (1952)*, the defendant conducted a vaudeville show for which an admission fee was charged. At the conclusion of the show the doors were opened, additional persons were admitted free of charge, and "Bingo" was played. The persons entering free participated in the distribution of prizes. The New York Court of Appeals held that the scheme was not a lottery in that proof was lacking that participants in the game were "persons who have paid * * * consideration for the chance" (304 N. Y. at p. 382).

In *Brice* v. *State,* 242 S. W. 2d 433 (Tex. Crim. App. 1951), a merchant gave away prizes at the opening of his store. Anyone could become eligible for the drawing by going to the store and signing the registration book there. There was no requirement that the registrant buy anything. The court held that consideration was lacking.

In *Cross* v. *People,* 18 Colo. 321, 32 Pac. 821 (1893), the defendants gave away pianos to advertise their shoe store. Chances were given free to all who registered at the store, and also to those who sent in a written request together with a stamp. Information regarding the free pianos was published in the newspaper as a part of an advertisement of defendants' shoes. The court held the program not a lottery, stating that the adjudicated cases made the payment of a valuable consideration for the chance an essential element of a lottery and that the benefits to the merchant were too remote to meet that requirement.

In *State* v. *Big Chief Corporation,* 64 R. I. 448, 13 A. 2d 236 (1940), cash prizes were awarded by a grocery mar-

* The statement of facts appears only in the official report.

ket to persons who became participants by registering and obtaining free tickets at the market. Participants were not required to buy any groceries in order to be eligible, but they were required to go to the market within the preceding five days and have their registered card marked accordingly. The court recognized that the program had had the effect of increasing the attendance at the market but held that consideration having a pecuniary value was an essential element of a lottery:

> "It has been held in a few cases that the requirement of consideration is satisfied by any conduct which would constitute consideration for an executory contract. See, for instance, Maughs *v.* Porter, 157 Va. 415, 161 S. E. 242. But this holding is against the very great weight of authority and we do not follow it in the instant case.
>
> "On the contrary, we accept and apply the doctrine that the consideration, required as one of the necessary elements of a lottery within the meaning of that term as used in statutes forbidding lotteries, must be a consideration having a pecuniary value. Commonwealth *v.* Wall, 1936, Mass., 3 N. E. 2d 28" (64 R. I. at 454, 13 A. 2d at 239).

The court observed that there was no evidence that people had paid money for the chance as well as merchandise, nor even that persons had bought merchandise from the defendant because they came to the market in order to participate in the drawings. The court made clear that it did not decide whether such evidence would have constituted a lottery, but, on the stipulated facts it was plain that the lottery laws had not been violated. The FCC attempts to distinguish the *Big Chief* case as inapplicable because of the lack of evidence of monetary contribution by the participants to the promoter, but surely that is the very

fact which is so conspicuously absent in the broadcast contest programs.

A leading case of this group is *Yellow-Stone Kit* v. *State,* 88 Ala. 196, 7 So. 338 (1890), which has been so often cited that the Commission criticizes most similar cases as being "inbred" with it (FCC Br. p. 55; see pp. 31-32 *infra*). The court held that a traveling medicine man was not conducting a lottery merely because he awarded free prizes to those attending his show. No charge was made for entrance into the tent, and tickets for the drawing were distributed free, but a fee was charged for a seat. During the course of the show, Kit sold patent medicines. Both the Alabama Constitution and statutes forbade lotteries.

The court rested its decision that the law was not violated on the ground that no consideration was paid directly or indirectly for the chance of participating in the distribution. In its view, neither the decided cases nor the policy of the statutes would justify considering Yellow-Stone Kit's conduct as criminal.

> "It may be safely asserted, as the result of the adjudged cases, that the species of lottery, the carrying on of which is intended to be prohibited as criminal by the various laws of this country, embraces only schemes in which a valuable consideration of some kind is paid, directly or indirectly, for the chance to draw a prize. [citing cases] * * * " (88 Ala. at 199, 7 So. at 338).

The lottery law as interpreted by *Yellow-Stone Kit* v. *State* continued to be the law of Alabama even after several statutory revisions and was expressly approved by *Grimes* v. *State,* 235 Ala. 192, 178 So. 73 (1938), which the Commission cites as if it represented a change in the Alabama law (FCC Br. pp. 59-60).

Other cases have reached the same result on analogous states of facts. See, *e. g., Post Publishing Co.* v. *Murray,* 230 Fed. 773 (1st Cir. 1916), *cert. denied,* 241 U. S. 675 (1916) (discussed in detail in Point II below); *People* v. *Mail and Express Co.,* 179 N. Y. Supp. 640 (Spec. Sess. 1919), *aff'd mem.,* 231 N. Y. 586, 132 N. E. 898 (1921).

Three cases have held promotional schemes falling within this same general class to be lotteries, and they are relied on by the Commission.* These decisions are in conflict with the great weight of authority. They are, of course, directly contrary to the decisions just discussed. They also are directly contrary to all of the decisions holding legal theatre Bank Nights with free-play features, *e.g., Darlington Theatres* v. *Coker,* 190 S. C. 282, 2 S. E. 2d 782 (1939). Perhaps most important, they are basically inconsistent with the reasoning of all of the cases in which the decision that a given scheme was a lottery has turned upon a finding that something of value was actually given by the participants for their chance. This includes both "gift enterprise" cases, such as *Horner* v. *United States,* 147 U. S. 449 (1893), and that majority of the Bank Night cases which has expressed in words its recognition that something of value has actually been extracted from the Bank Night audience by the promoter in consideration of the

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* In a footnote the Commission cites three additional cases (FCC Br. p. 52n). Two are, as the Commission's own statement shows, cases in which participants (or someone on their behalf) either paid for lottery tickets or bought merchandise. As to the third, *Bader* v. *City of Cincinnati,* 21 Ohio L. R. 293 (C. P. 1923), affirming *State* v. *Bader,* 24 Ohio N. P. (N. S.) 186 (1922), the erroneous statement is made that a cafeteria gave chances free to patrons and non-patrons alike. According to the opinion, "the overwhelming majority" of the tickets were presented to patrons when they paid for their meals and, according to the defendant, "some" of the tickets were distributed to persons other than patrons and at places other than the restaurant. Nothing in the opinion supports the inference that tickets would be given free to any non-patron who made the request. The case was clearly in the "gift enterprise" class.

chance which he has given it to win a prize. The importance of the Commission's three cases in determining the accepted meaning of the word "lottery" must be judged against this background of overwhelming disagreement.

The earliest of the three decisions was *Maughs* v. *Porter,* 157 Va. 415, 161 S. E. 242 (1931). Mrs. Maughs, one of those who had been lured to attend an auction on the promise that a new Ford would be given away by lot among those attending, regardless of whether or not they paid, had won the raffle and was suing Porter, the auctioneer, to compel him to deliver the Ford to her. Porter's defense apparently was that either his promise lacked consideration and therefore was not a contract, or that, if consideration was present, the scheme was a lottery and illegal. The court found that Mrs. Maughs' attendance at the auction pursuant to the conditions expressed in Porter's advertisement constituted consideration both for Porter's promise and for a lottery, and that the promise was therefore a contract unenforceable for illegality. The *Maughs* case has been severely criticized by legal writers and by courts. *E.g.,* 80 U. Pa. L. R. 744, 18 Va. L. Rev. 465; *Darlington Theatres* v. *Coker,* 190 S. C. 282, 2 S. E. 2d 782 (1939); *Griffith Amusement Co.* v. *Morgan,* 98 S. W. 2d 844, 847 (Tex. Civ. App. 1936); *State* v. *Big Chief Corp.,* 64 R. I. 448, 454, 13 A. 2d 236, 239 (1940). It was considered and rejected as unsound by the majority of the District Court in the present case.

The second case holding illegal a similar business promotional scheme was *State* v. *Blumer,* 236 Wis. 129, 294 N. W. 491 (1940). There a drugstore operator ran daily pools with a prize of $1. In order to be eligible for the prize a participant must have gone to the drugstore on the day preceding the drawing and there requested and obtained a daily coupon, for which no charge was made.

In the third case holding a similar promotional scheme to be a lottery, tickets might be obtained free upon request from service station attendants. *Knox Industries Corp.* v. *State ex. rel. Scanland,* 258 P. 2d 910 (Okla. 1953). The winning number was posted at the service stations.

While the *Maughs, Blumer* and *Knox* cases are the outer limits of what courts have held to be lotteries (and are contrary to the weight of authority), they fall far short of the facts of the instant case. In the *Maughs* case, Mrs. Maughs was required by the auctioneer to pay him a $5 fee for his services in drawing the winning number. In the *Knox* case the participant who held the winning number might be required to travel to another city to claim the prize. It takes little imagination to recognize the likelihood of pressure to buy something from the druggist who distributed the free coupons in the *Blumer* case, and to buy gasoline at the service stations in the *Knox* case. In all three cases the participants were required to leave their homes and travel to the promoter's place of business, the considerable inconvenience of which was emphasized by the courts.

No similar requirement or indirect coercion is to be found in "What's My Name?" or any other standard telephone giveaway program. The listener participates from his own home. He does not have to go to the promoter's store. He is not required to ask sales personnel for free chances.

The prospect of winning a prize on such programs does not induce anybody to buy anything. At most it induces persons to listen to the program, an act which costs the listener nothing. If, because of listening to the commercials on the program, a person thereafter buys the sponsor's product, it is not the prospect of winning—the "bait" —which has stimulated the purchase. The contest is

over by that time, and it is perfectly clear to any prospective purchaser that his chances of winning a prize have absolutely no relation to whether he buys or ignores the sponsor's product.

The obvious fact is that the programs which the Commission desires to prohibit do not in the least meet the tests considered significant in the cases on which the Government relies. Without exception, those cases have involved situations where the participant in the scheme was either required to make an actual purchase or to take steps which brought him up to the point of sale,—the lobby of a theatre in the "Bank Night" cases, or the place of an auction in *Maughs* v. *Porter*. That cannot be said of the programs now under the Commission's attack.

The District Court with respect to this aspect of the case made the following cogent comments:

> "We may assume that when a manufacturer becomes a sponsor for a radio or television program, the amount he will pay for it will depend upon its popular appeal, the size of the invisible audience it is likely to attract. The features of a program that have a special appeal may be many and varied. • • •
>
> "It is not the value of the listening participants to the station or sponsor that is the valuable consideration contemplated by the lottery statute. Griffith Amusement Co. *v.* Morgan, Tex. Civ. App. 98 S. W. 2d 844. It is the value to the participant of what he gives that must be weighed. People *v.* Cardas, 137 Cal. App. Supp. 788, 28 P. 2d 99. What do the prospective participants give? The Commission argues that it is a 'legal detriment' to the listener or viewer to sit at home listening to the program and awaiting a telephone call from those in charge of the contest. Technically, and applying the law of contracts, that may be true. But that is not sufficient where a lottery statute, a criminal statute,

is involved. The alleged legal detriment to the radio listener is not the kind of a 'price' or 'thing of value' paid by a participant in a lottery, which the law contemplates as an essential element of a lottery. Commonwealth *v.* Wall, 295 Mass. 70, 3 N. E. 2d 28; State *ex rel.* Stafford *v.* Fox Great Falls Theatre Corp., Mont., 132 P. 2d 689; People *v.* Burns, 304 N. Y. 380, 107 N. E. 2d 498. There are cases to the contrary, see footnotes in 54 C. J. S., Lotteries, §2, on page 848, but this seems the more reasonable view" (110 F. Supp. at 386).

B. The Commission's Treatment of Contrary Authorities.

Faced with the almost unanimous consensus of the courts that a *valuable* consideration—"any money or thing of value", as it is termed in paragraph (b)(1) of the Order—is an element necessary to an illegal lottery, the Commission has sought to dispose of these adverse decisions by two devices: first, by discarding all decisions under statutes which refer in terms to a valuable consideration, since Section 1304 does not; and, second, by derogating all other adverse decisions on the grounds that they "uncritically" cite cases under differing statutes and that they are "tightly inbred" with an Alabama case decided in 1890, *Yellow-Stone Kit* v. *State,* 88 Ala. 196, 7 So. 338 (1890), on which the Commission prefers to concentrate its fire. Both of these distinctions are without substance.

The difference in language of the statutes is unimportant because the decisions have turned, not on the language of the statutes, but on the courts' conceptions of the meaning to be attributed to the term "lottery" and similar terms, which the statutes have used to denominate the activities declared to be criminal. "*Valuable* consideration" has been considered an essential element of a lottery, not a separate requirement added by the terms of certain

statutes, and the cases are explicable only upon this understanding. Thus, with few exceptions the courts have treated statutes referring expressly to a valuable consideration as adding nothing to the common law as to what a lottery is, and they have treated cases under either type of statute as equally authoritative. Compare, out of many examples, *People* v. *Shafer,* 160 Misc. 174, 289 N. Y. Supp. 649 (Monroe Co. 1936), *aff'd mem.,* 273 N. Y. 475, 6 N. E. 2d 410 (1936); and *People* v. *Cardas,* 137 Cal. App. 788, 28 P. 2d 99 (1933), which were under statutes expressly referring to a "valuable" consideration, and each of which cited cases under statutes not so phrased as authoritative, with *Affiliated Enterprises, Inc.* v. *Gruber,* 86 F. 2d 958 (1st Cir. 1936); *Griffith Amusement Co.* v. *Morgan,* 98 S. W. 2d 844 (Tex. Civ. App. 1936), and *State* v. *Big Chief Corp.,* 64 R. I. 448, 13 A. 2d 236 (1940), each of which, under statutes not so phrased, relied on cases under statutes containing the words "valuable consideration" as authoritative.

In *People* v. *Burns,* 304 N. Y. 380, 107 N. E. 2d 498 (1952), the statute, set forth verbatim in the statement of the case preceding the opinion in the official report, uses the phrase "valuable consideration." The New York Court of Appeals, however, in its *per curiam* opinion, stated that there was no lottery since proof was lacking that the participants in the game "were 'persons who have paid * * * consideration for the chance'" (asterisks in original), deliberately omitting from its quotation of the statutory language the word "valuable" before the word "consideration." Even *Knox Industries Corp.* v. *State ex rel. Scanland,* 258 P. 2d 910 (Okla. 1953), so heavily relied on by the

Commission to demonstrate that consideration need *not* be valuable is under a statute requiring valuable consideration, yet disregards this language, citing cases under both types of statutes with no suggestion that the difference in language might justify a different treatment.

In most of the decisions applicable statutes are actually quoted, so that no court reviewing the authorities could fail to discern that there are differences in the statutes. The suggestion by the Commission (FCC Br. p. 59) that the state courts which decided these cases were so "uncritical" that they did not recognize the difference in the statutes is impertinent. The courts were deciding the elements of the "lottery" which each statute prohibited as a crime; that they cited cases under different statutes demonstrates that they considered statutes which set out in detail elements such as "valuable consideration" to be declaratory of the effect of the statutes which simply prohibit lotteries as such. Plainly both the holdings of the cases and the views of the courts which decided them are against the Commission's position.

The Commission's method of dealing with the rest of the large number of cases directly contrary to its position is particularly interesting (See FCC Br. pp. 54-60).

Garden City Chamber of Commerce v. *Wagner,* 100 F. Supp. 769 (E. D. N. Y. 1951), *petition for stay dismissed on opinion of court below,* 192 F. 2d 240 (1951), (*supra,* pp. 21-22), is stigmatized as the only federal decision relied on by the District Court—although *no* federal decisions have ever supported the Commission's views on this point, and, as the Commission is aware, several have taken the opposite view.

As to other contrary authorities, the Supreme Judicial Court of Massachusetts might be dismayed to learn that its decisions, like the decisions of Texas, South Carolina,

New Hampshire, Colorado, Iowa, the Northern District of Illinois, Minnesota, and the First Circuit Court of Appeals, are all "tightly inbred" with an earlier Alabama decision.* Surely it is a new doctrine that for one court to cite another is a sign of "inbreeding". The Commission, however, is willing to make the same accusation against all cases which have even cited other cases which have in their turn cited the Alabama case.

Like the distinction of statutory language, this accusation of "tight inbreeding" fails to meet the crucial fact that, on the law, all of the courts of which the Commission disapproves hold that there is no lottery, gift enterprise or similar scheme unless a valuable consideration is required of the participants; that under those circumstances the use of these terms known to the law in a criminal statute should lead to their interpretation in accordance with the weight of authority as to their meaning; and that the Commission in purporting to interpret a statute has no standing to choose a deviant interpretation which it likes better unless it has reasonable grounds to believe that such was the meaning of Congress.

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* The Commission says in its brief (pp. 55-6) that this decision, *Yellow-Stone Kit* v. *State*, 88 Ala. 196, 7 So. 338 (1890), (discussed *supra*, p. 24) was the first to require a valuable consideration. This is completely misleading, since it implies that earlier cases did not. In fact, the earlier cases had made the requirement of valuable consideration so plain from their treatment of the lottery problem as a whole, that the necessity for expressly ruling on this point was never presented. *Yellow-Stone Kit* itself makes this clear. The sentence partially (and misleadingly) quoted in the Commission's brief at page 57 goes on to say:

> "* * * we find no decision in which the element of a valuable consideration parted with, directly or indirectly, by the purchaser of a chance, does not enter into the transaction [citing many cases]." (88 Ala. at 200, 7 So. at 339).

C. The Purpose of the Lottery Statutes.

The main thrust of the Commission's argument is that the anti-lottery statutes are intended to improve the moral fibre of the American people by preventing them from submitting to their "cupidity" when appeals are made to their "gambling spirit"; that the radio and television contests here under attack, because they offer "something for nothing", make use of this cupidity to arouse the gambling spirit and thereby damage the moral fibre of the American people; that, since the "evil" is the same, the programs must be considered to be prohibited by the statutes.

If Congress intended the Commission or the courts to have a roving commission to stamp out the "gambling spirit", language would not have been difficult to find in which to express it. The present statute certainly does not.

Nothing could be further from the truth, however, than to suggest, as the Commission does, that the decision below is based upon the theory that the lottery statutes were designed solely to prevent the "impoverishment of the poor."

The answer is obvious and rests in avoiding such doctrinaire distinctions. Congress is no doubt interested in avoiding the impoverishment of the poor. Congress may also have had in mind that some manifestations of the "gambling spirit" are undesirable, but Congress in passing the lottery statutes had no such great ends in mind as the Commission credits it with. It instead was attacking specific activities of which it disapproved.

In its brief in support of its appeal, the Commission has also committed itself without reservation to an interpretation of the law which is not to be found in the rules which it seeks to have upheld,—a position perhaps suggested to it by the dissenting opinion of Judge Clark below—that

"surely the yield to the operator is all important" (110 F. Supp. at 393; FCC Br. pp. 22-3, 47-51).

"Price" in this view is nothing more than a touchstone determining whether a particular award is a gift, resulting from mere altruism, or a prize, constituting part of a commercial scheme intended to result eventually in profit. If the award is the latter, it necessarily constitutes an illegal lottery (assuming the presence of chance). Only if, according to Judge Clark and the Commission, the award is made by an eccentric millionaire is consideration not present.

It is not difficult to demonstrate the absurdity of this analysis, quite apart from its lack of consistency with the concern over the "gambling spirit" evidenced elsewhere. Turning from the eccentric millionaire to a more immediate illustration, the analysis on which Judge Clark and the Commission have relied leaves entirely unanswered the question of the status of a contest program in all respects similar to the programs which the Commission insists are illegal, but conducted without a sponsor, either as a sustaining program on a commercial station, or by a nonprofit station operated by an educational institution or a municipality. If WNYC, the New York City municipally owned station, for example, were to conduct a typical radio giveaway program, there can be no question whatsoever that the rules which the Commission is asking this Court to uphold and enforce would be violated by the program, and WNYC would be subject to forfeiture of its license. There is not a hint in the rules or in the Commission's Report—let alone in the statute which these purport to interpret—that a radio station not operating for profit is any more entitled to broadcast lottery information than a commercial station. The fact is, surely, that the presence or absence of a pecuniary benefit to the promoter is not only not "all-

important" but entirely irrelevant to the existence of a prohibited lottery.

Criminal laws are not an appropriate field for the adoption of such doctrinaire positions. It is not for the Commission to determine that something not made a crime by Congress should be treated as such because it is equally harmful. As was said by this Court through Chief Justice Marshall in *United States* v. *Wiltberger,* 5 Wheat. 76, 95 (U. S. 1820):

> "It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

The Commission's insistence in its brief that the popularity of broadcast contest programs is due to their appeal to "cupidity" and not to their entertainment value ignores the absence of any finding or evidence to that effect. (See p. 9, *supra*). The only NBC program remaining in the case, "What's My Name?", is conducted in such a manner that the hope of winning a prize could not possibly influence people to listen to the program, which therefore must make its way solely on its value as entertainment. (See pp. 6-7, *supra*). The Order would make the program illegal in any case, however, so that the Commission's present argument is plainly directed against a straw man of its own devising.

Indeed, the Commission's Order, if enforced, will actually outlaw all audience participation contests in the field of radio and television broadcasting, however innocent,

on the ground that they are all lotteries, although audience participation contests are utilized generally in other fields, by teachers as well as by entertainers. This results from the special applications which the Commission makes of the traditional legal tests for lotteries.

"Prize" of course is traditional in any contest, from a school track meet to a bridge club tournament. A contest must have a prize, so radio and television contest programs start with this strike against them.

"Chance" is equally reduced to a matter of course by the Commission's ruling (paragraph (b)) that it is sufficient for chance to play a part in the selection of the contestant. If a contest is to involve live participation by members of a broadcast audience, selection of contestants out of so great a mass without the introduction of a random element would be most difficult; in point of fact, selection is customarily by lot in such programs, the choice being made from those members of the audience who have indicated in writing their desire to participate. Thus the second strike is called by the Commission.

Since the tests of "prize" and "chance" are so easily satisfied, the stage is set for the completely arbitrary result of outlawing audience participation contests in radio and television. This is done by the Commission's categorical position that being a member of the home audience is in itself sufficient consideration. So the program—every such program—is banned.

The last two of the three tests are held by the Commission to be satisfied by what are after all pure technicalities, inherent in the nature of broadcasting. The simple result is to forbid radio and television broadcasters to engage in activity that is innocuous.

II.

The intent of Congress was that Section 1304 should be construed in accordance with the existing law.

Section 1304 of the Criminal Code in effect extended to broadcasting the prohibition against dissemination of lottery information which had long been in effect under federal statutes relating to the mails, and which now is codified as Sections 1301-3 of the Criminal Code. The last revision of the language of the postal lottery laws of any significance occurred in 1909, and that revision was minor. In 1934, when the Communications Act was passed incorporating as Section 316 the prohibition which now constitutes Section 1304 of the Criminal Code, there was a history of interpretation of the postal lottery statutes which had resulted in a well-established meaning for the words "lottery, gift enterprise, or similar scheme." Those words were limited to schemes in which participants were required to furnish a *valuable* consideration, and it was clear that technical contract consideration was inadequate to meet this requirement. See *Post Publishing Co.* v. *Murray,* 230 Fed. 773 (1st Cir. 1916), *cert. denied,* 241 U. S. 675 (1916); *Peek* v. *United States,* 61 F. 2d 973 (5th Cir. 1932).

When Congress chose the identical words to define the broadcasts to be prohibited, it could only have intended that the interpretation established under the earlier statutes should be applied to the new one.

Statutory Derivation.

The Commission's brief cites many of the earlier statutes which preceded the Act of March 4, 1909, in which the prohibition against postal lotteries first assumed the precise

form in which it exists today. However, the quotations fail to disclose what an examination of their context makes clear —that the statutes were plainly and beyond any doubt whatsoever drawn to deal with a situation in which the "price" or "consideration" extracted from the participant took a pecuniary form.

That this was the purpose of the anti-lottery statutes is especially clear from the language of the Revised Statutes. The three sections of the Revised Statutes covering lotteries prohibited sending through the mails material of the types described in the following language:

"Sec. 3929:

"'* * * conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property, by lot, chance, or drawing of any kind, or in *conducting any other scheme or device for obtaining money through the mails* by means of false or fraudulent pretenses, representations, or promises, * * *'

"Sec. 4041:

"'* * * conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or in *conducting any other scheme or device for obtaining money through the mails* by means of false or fraudulent pretenses, representations, or promises, * * *'

"Sec. 3894:

"'* * * concerning illegal lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or *concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money* under false pretenses, * * *'" (Emphasis added in each quotation).

In each instance the emphasis is plain that the schemes which are prohibited are those intended for "obtaining money."

The word "illegal" was deleted from Section 3894 in 1876 (L. July 12, 1876. § 2, 19 Stat. 90), but otherwise there was no change in the language until 1890. In L. Sept. 19, 1890, 26 Stat. 465, the language chosen was:

> "• • • concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, • • •"

Both the House and Senate Committee Reports recommending the passage of this statute emphasize that the statute is primarily intended to deal with the sweepstakes type of lottery—specifically the Louisiana State Lottery. The following language of the House Report was adopted and included in its Report by the Senate Committee:

> "It is not the object of this report to debate the question as to whether lottery companies are inimical to public morals or of immoral tendency. The day is passed for such discussion. It is admitted, or probably not seriously denied, that the existence of such swindling schemes is promotive of the spirit of gambling, and results in serious disaster to many citizens." (H. R. Rep. No. 2844, 51st Cong., 1st Sess. (1890) p. 4; Sen. Rep. No. 1677, 51st Cong., 1st Sess. (1890) p. 4).

Surely it could not be argued that a statute passed for the purpose of preventing "swindling schemes" was intended to apply to activities such as the broadcast contest program here under attack.

In L. March 2, 1895, 28 Stat. 963, substantially the same phraseology was used except that the references to "obtaining money" through "false pretenses" were eliminated. As the Commission emphasizes in its brief (FCC Br. p. 36), the 1890 and 1895 language, "* * * lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, * * *", is not substantively different from the present language, except in its omission of the words "in whole or in part" in connection with the dependence upon "lot or chance." That addition was made in 1909 (L. March 4, 1909, §§ 213, 214, 237, 35 Stat. 1129, 1130, 1136) and is of course without significance in so far as the question of "price" or "consideration" is concerned.

In 1934, therefore, the operative language with which this case is concerned had been in the federal criminal statutes for approximately forty years. It is of controlling significance that during those forty years application of this language was, without exception, only to schemes in which a *valuable* consideration was required of the participant. The derivation from earlier statutes which described the prohibited activity in greater detail and emphasized the function in the statutory scheme of "obtaining money" allows little doubt that the courts which so limited the statute reached the only possible interpretation; certainly the Commission's suggestion that the language is broad enough to cover situations where nothing is extracted from the contestant except his attention to the contest would have seemed hardly tenable.

However, even if this interpretation were considered to be erroneous if reviewed as a matter of first impression, the fact that Congress in 1934 chose for Section 316 of the Communications Act language which had received such an

interpretation establishes the meaning which Congress intended the new statute to have.*

Judicial Interpretation of the Postal Lottery Statutes.

The case of *Post Publishing Co.* v. *Murray,* 230 Fed. 773 (1st Cir. 1916), *cert. denied,* 241 U. S. 675 (1916), is generally considered to be the leading case on the interpretation of the federal postal lottery statutes. The Boston Post developed an advertising scheme consisting of publishing pictures of Boston ladies shopping, but with the heads cut off the photographs. Each lady who recognized her picture won five dollars. The papers were excluded from the mails by the Postmaster. The Court of Appeals for the First Circuit unanimously held the scheme legal, and directed that the newspaper should get the relief it sought from the Postmaster's order.

The court said:

> "The advertisement, or scheme, in question does not seem to be like any of the kinds or types of wrong against which the act of Congress was directed. It did not present a lottery scheme, because a lottery involves a scheme for raising money by selling

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* While the legislative history of this Section of the Communications Act of 1934 is unilluminating, the corresponding Section of the Davis Bill, H. R. 7716, 72d Cong., 1st Sess. (1932), a predecessor bill containing a similar prohibition, was expressly commented on by its sponsors. Thus H. R. Rep. No. 221, 72d Cong., 1st Sess. (1932), states as a reason for adopting a prohibition of lottery broadcasting:

> "Furthermore, the broadcast of such information is unfair to the newspapers, which are forbidden the use of the mails, if they contain such information."

Similar language is present in Sen. Rep. No. 564, 72d Cong., 1st Sess. (1932), and was used by the Senate managers in explaining the bill on the floor of the Senate (76 Cong. Rec. 3767-8). This seems clearly to indicate an intent to prohibit only such subject matter as the postal lottery laws prohibited to newspapers.

chances to share in a distribution of prizes—a scheme for the distribution of prizes by chance among persons purchasing tickets. It was not a gift enterprise, because a gift enterprise contemplates a scheme in which publishers or sellers give presents as an inducement to members of the public to part with their money. *Nor did it present the kind of lot or chance which the act of Congress was striking against, because the particular kind of chance involved in the advertisement in question did not require a parting with anything by members of the public for the prize offered.*

• • • • • •

"The advertisement in question, while ingenious, and rather gruesome in some of its phases, after all involved only harmless novelty, promoted probably by the radical change in women's street costume, and carried forward with the purpose of attracting attention to the newspaper and of increasing its circulation, rather than as a scheme involving direct and specific intent to induce members of the public to part with money, which seems to be a necessary element of the statute against lotteries, gift enterprises and games of chance.

• • • • • •

"We only refer to the interesting discussion by Chief Justice Perley, with reference to gift enterprises. State *v.* Clarke, 33 N. H. 329, 66 Am. Dec. 723. The federal statute, generally speaking, is in conformity with substantially similar statutory enactments in the various states, and the opinion of Chief Justice Perley is interesting, because it points out, in a very clear way, the idea that these statutes are effective against enterprises and schemes which induce or cheat members of the public into parting with their money on the idea that they are to get something through lot, chance, or expectancy, with

> the result, in the end, of being cheated" (pp. 775-777). (Emphasis added)

While other cases did not discuss in detail the nature of the consideration required, they present sufficient corroboration of the *Post Publishing* case to make it clear that this was the view generally accepted in the federal courts. Thus in *Peek* v. *United States,* 61 F. 2d 973 (5th Cir. 1932), the court said:

> "A 'lottery' is usually defined as 'a scheme for the distribution of prizes or things of value by lot or chance among persons who have paid or agreed to pay a valuable consideration for the chance to obtain a prize.' 38 C. J. p. 287; Webster's International Dictionary. * * * We considered this statute recently in Boasberg *v.* United States, 60 F. (2d) 185, 186, saying: 'To be like a lottery there must be something staked, a larger possible winning, and the winning or losing must depend on lot or chance and not on skill or judgment.'" (p. 974)

In *United States* v. *Hughes,* 53 F. 2d 387 (S. D. Tex. 1931), which found a lottery to exist, it was pointed out:

> "The indictment alleges sums of money paid to defendants by the beneficiaries. This is I think a sufficient allegation of consideration." (p. 390)

It is pointed out above that the reasoning of *Horner* v. *United States,* 147 U. S. 449 (1893), assumes the necessity for finding valuable consideration, which of course it was readily able to do, since money was in fact paid. (*supra,* pp. 17-18).

We are aware of no case which has suggested that under the federal postal lottery statutes anything less

than money or a "*valuable* consideration" would be sufficient.*

Under the circumstances it is submitted that the District Court was clearly correct when it said:

> "The Federal lottery statute does not define a lottery. The term 'lottery' should be given its usual or popular meaning. Since it was part of the Federal Criminal Statute for so many years before the Federal Communications Act was adopted in 1934, the term 'lottery' should, in interpreting Section 316 of the Federal Communications Act, be given the interpretation which it had received in cases construing former Section 336 of the Federal Criminal Code. Brown *v.* Duchesne, 19 How. 183, 60 U. S. 183, 15 L. Ed. 595; Burnet *v.* Harmel, 287 U. S. 103, 53 S. Ct. 74, 77 L. Ed. 199; Van Beeck *v.* Sabine Towing Co., 300 U. S. 342, 57 S. Ct. 452, 81 L. Ed. 685; N. L. R. B. *v.* John W. Campbell, Inc., 5 Cir., 1947, 159 F. 2d 184." (110 F. Supp. at 382)

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* The view of the *Post Publishing* case remains the law today. Attention has been called above to the case of *Garden City Chamber of Commerce* v. *Wagner*, 100 F. Supp. 769 (E. D. N. Y. 1951) (*supra*, pp. 21-22), and the adoption by the Court of Appeals of this decision (over Judge Clark's objections) in 192 F. 2d 240 (2d Cir. 1951). *Affiliated Enterprises, Inc.* v. *Gruber*, 86 F. 2d 958 (1st Cir. 1936), did not involve the federal statutes except indirectly, since it turned on the question of whether Bank Night was an illegal scheme which a court of equity would not protect against copyright infringement and unfair competition; it cites, however, the *Post* case and numerous state cases, and follows them as to the necessity of a *valuable* consideration. *Affiliated Enterprises* v. *Gantz*, 86 F. 2d 597 (10th Cir. 1936), reached the opposite result on similar facts, considering the grant of free chances a subterfuge. As has been pointed out above, this result is equally based on the rule that valuable consideration is necessary, and represents only a difference in interpretation of the factual significance of the free chance device in Bank Night. Other cases, such as *United States* v. *Rich*, 90 F. Supp. 624 (E. D. Ill. 1950), which have found consideration present within the meaning of the statutes, are consistently cases where a money consideration is in fact paid.

The Commission suggests that the court below was overlooking the words "or similar schemes" in the statute. As far as we are aware, however, there has never been any such distinction made in any federal case. The words "lottery, gift enterprise or similar scheme" have been in the federal statutes since 1909, and the traditional tests of chance, prize and consideration have always been held applicable to the entire phrase. A "gift enterprise", as has been shown above, is simply a type of lottery; a "scheme" not of the same nature would hardly be "similar" to either "lotteries" or "gift enterprises."

The direct answer to the Commission's argument that the words "similar schemes" should now, 44 years after their original insertion into the postal lottery statute, be held to cover the broadcast of telephone giveaway programs, is that no such substantive change in the criminal law should be permitted to result from a mere administrative reinterpretation.

The Interpretation of the Postal Authorities.

The Commission's brief is in error, no doubt unintentionally, in its suggestion at page 63 and in note 48 of its brief that the Post Office Department's position on the interpretation of the postal lottery statutes is or has ever been that "trouble or inconvenience, even of a slight degree" constitutes sufficient consideration to support the condemnation of a particular enterprise as a lottery.

In point of fact, this is not the Post Office Department's position, and none of its bulletins on the proper interpretation of the postal lottery laws supports the Commission's argument. Judge Thomas in his book, relied upon and quoted from by the Commission, was stating his personal views on the subject, not those of the Post Office Department.

The latest postal bulletin quoted in the footnote on page 63 of the Commission's brief supports not the Commission's position, but the decision of the Court below. It requires at least "an expenditure of substantial effort or time" before there is the consideration to support finding an enterprise to be a lottery.

An earlier ruling dated February 13, 1947 appears in the record at pages 229-230. The operative paragraph reads:

> "In order for a prize scheme to be held in violation of this section, it is necessary to show (in addition to the fact that the prizes awarded by means of lot or chance) that the 'consideration' involves, for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. *On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present.*" (R. 230) (Emphasis supplied)

Contrary to the Commission's argument, this view is in complete disagreement with both Judge Thomas's statement and with the Commission's suggestion that the most minuscule consideration, even attention to the contest itself, is consideration, since "the yield to the promoter is all important."

The best evidence of the Post Office Department's attitude is the rulings which it has given on the very type of program here under attack. In 1949 the Solicitor of the Post Office Department ruled that material relating to "Stop the Music" would be mailable (R. 27). In 1950, he ruled that material relating to a contest conducted on a program called "Truth or Consequences" would be mailable (R. 25).

While earlier rulings on the program "Mu$ico" had been conflicting, in 1949 the Solicitor of the Post Office Department expressed the view that if the program were to be resubmitted, it would be held not to conflict with the postal lottery laws (R. 229). As the record makes clear, each of these programs involved all of the elements which under the interpretation reflected in the Commission's Order would make them lotteries.

The Established Interpretation of the Lottery Laws Should Not be Enlarged without Affirmative Congressional Action.

For 20 years since the Communications Act of 1934 became law telephone giveaway programs have been broadcast on the assumption that they were legal. The Justice Department and the Post Office Department, interpreting the lottery statutes committed to their administration by Congress, appear to have agreed. Indeed the Commission in 1943 agreed and recommended a change in the statute (R. 27-30; p. 9, *supra*).

It should not be in the province of any administrative agency to declare illegal what has so long been construed as legal. This Court's recent decision in *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), is directly applicable. The Court there said:

> "In Federal Baseball Club of Baltimore *v.* National League of Professional Baseball Clubs, 259 U. S. 200 (1922), this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop,

> on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." (pp. 356-57)

In the present case, to be sure, there is no controlling decision of this Court, but on the other hand the lower court decisions which the Commission wishes to have overruled were the most authoritative interpretations of the federal lottery laws at the time Congress was extending that law to the new field of broadcasting. Further, when Congress was asked by Chairman Fly to take specific action against radio giveaways, its failure to act could only be construed by broadcasters as a reaffirmation that Congress did not consider the programs to be harmful. The *Toolson* case is a clear authority that under such circumstances changes in the law should be accomplished only by legislation.

In the very field of lottery law this Court, in *United States* v. *Halseth*, 342 U. S. 277, 280, 281 (1952), expressly condemned an administrative enlargement of the scope of Section 1301 of the Criminal Code, prohibiting interstate transportation of lottery materials. There the Post Office Department had several times requested Congress to amend the statute to cover punchboards. No such amendment was ever adopted, but an attempt was made to prosecute the transportation of punchboards under the existing section. The Supreme Court, pointing out that a penal statute should be strictly construed, refused to interpret the statute as covering punchboards. If an addition to the law was to be made, the Court observed, "• • • it is for Congress to make the addition" (p. 281). If contest programs which have been broadcast for 20 years and which neither the

Department of Justice nor Congress has seen fit to take action against, are now to be added to "schemes" held to be lotteries, "it is for Congress to make the addition."

III.

The Commission's Order in its original form exceeded its statutory authority.

The Order is Contrary to Section 326 of the Communications Act.

The extension of the Commission's powers to include the prohibition of specific programs violates both the spirit and the letter of Section 326 of the Communications Act of 1934. That Section reads as follows:

> "Sec. 326. *Censorship.*
>
> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

In its discussion of the arguments presented to the District Court the Commission conspicuously omits any reference to Section 326 (FCC Br. pp. 12-14). That section, however, is an essential part of the basic argument that the Order is outside of the Commission's statutory authority, for it expressly limits the interpretation of the rest of the act. It forbids any construction of the sections granting general rule-making and licensing powers which would permit the Commission to exercise "the power of censorship."

It was the Commission's position below that such cases as *National Broadcasting Co.* v. *United States,* 319 U. S.

190 (1943), which have upheld the enforcement against broadcasting stations of economic regulations, and cases which have held the First Amendment inapplicable to protect criminal conduct, have established that the Commission's regulations do not violate Section 326 (FCC Reply Brief in District Court, pp. 7-10).

But this interpretation deprives Section 326 of any content. Censorship would not necessarily have been unconstitutional. Not only is it regularly carried on in time of war, but even today, under the decisions of this Court, state and local agencies continue to exist for the sole purpose of censorship. Congress did not, however, forbid *unconstitutional* censorship; it forbade *all* censorship.

If the word "censorship" has any meaning at all, it must include the advance regulation of program content by absolute prohibitions under threat of revocation of licenses, as well as by any requirement that scripts be submitted for approval.* The only reasonable interpretation

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* There is a striking similarity in operation between the Commission's Order and the statute which this Court held unconstitutional in *Near* v. *Minnesota*, 283 U. S. 697 (1931). The *Near* case involved a Minnesota criminal statute forbidding the publication of a malicious, scandalous or defamatory newspaper. Upon conviction a permanent injunction might issue against publishing "a malicious, scandalous or defamatory newspaper." This Court held the statute unconstitutional as an infringement of the freedom of the press, relying primarily on the argument that the injunctive provisions constituted a previous restraint with respect to all subsequent publications. An injunction against future publications in such broad language, by bringing to bear the power of summary judgment for contempt, operated so as to deprive the publisher of any freedom of action.

The principal difference between the two situations, is that under the Minnesota statute the injunction could only issue after a trial was held and the defendant had been convicted of violating the law, and the injunction in theory could not prevent continued publication of a proper newspaper. Under the Commission's Order, on the other hand, no conviction whatsoever will be necessary, but only an administrative determination, and thereupon licenses will be refused for all purposes.

of this section is that the function of prohibiting specific programs, even if they would be illegal, was withheld from the Commission, and it could not use its general powers to accomplish such a prohibition indirectly. The section therefore specifically negatives the existence of a legislative mandate *directed to the Commission* to prohibit lottery broadcasts. The mandate exists, unquestionably, but it is addressed to the Department of Justice alone.

The Commission may urge that the absolute advance prohibition of giveaway programs which its Order is admittedly intended to accomplish is not "censorship" as long as the speech to be prohibited is contrary to a general legislative policy against "promoting the gambling spirit".

But to say that advance prohibition of speech is not censorship if the speech is contrary to some general policy is to concede to the censor all he needs for unlimited operation. Censorship in every age and nation has been able to find policy grounds to justify itself. The Commission will not be limited by the lottery laws. Jurisdictionally, indeed, the Commission relies on the supposed principle that in the exercise of its licensing powers it can properly refuse licenses to *anyone* who in its estimation has violated criminal statutes, whether or not ever indicted, tried or convicted of the alleged violation.

It may perhaps clarify this part of the problem to point out that the Commission's position is essentially the same as it would have been if Section 326, instead of *forbidding* censorship by the Commission, had expressly *authorized* the Commission to prohibit particular broadcasts considered against public policy to the full extent permissible under the Constitution. Under such a provision the Commission could have gone no further with respect to prohibiting broadcasts of telephone giveaway programs than it has done here.

The District Court made it clear that the constitutionality of the Commission's actions was dependent on the Order not being enforced against programs which do not actually partake of the evil of lotteries, and that the Commission's jurisdiction was similarly limited to application of established law. It said:

> "The Rules of the Commission, in their subject matter (lotteries), did not infringe the right of free speech or free press guaranteed by the First Amendment. [Citations omitted.] But in so far as some of their provisions [paragraph (b)(2), (3) and (4)] go beyond the scope of Section 1304 of the Criminal Code, they may be considered as a form of 'censorship' and to that extent they would be in violation of the First Amendment.
>
> "The merits of the 'give-away' programs are not an issue in this case. They appear to be a source of amusement for many thousands of people. Even if it could be said that 'we can see nothing of any possible value to society' in these programs, 'they are as much entitled to the protection of free speech as the best of literature' or music. Winters v. New York, 333 U. S. 507. When the radio or television audiences tire of them, they will make their exit. But the Commission cannot hurry them off by characterizing certain features of the 'give-away' programs as lotteries, if as a matter of law they are not." 110 F. Supp. at p. 389.

There is a substantial danger in allowing the Commission to go beyond the established authorities in the guise of interpretation, however plausible its reasoning. Freedom to do so would necessarily involve the exercise of personal judgment in the absence of an objective and readily ascertainable standard, which this Court condemned in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952), and in *Superior Films, Inc.* v. *Department of Education of State*

of Ohio and *Commercial Picture Corp.* v. *Regents of University of New York,* U. S. , 22 U. S. Law Week 3193 (1954).

Section 1304 of the Criminal Code Forms No Basis for the Commission's Assertion of Jurisdiction.

The Commission argues that the programs which it seeks to prohibit are allegedly already in violation of Section 1304. If their broadcasting is a criminal offense, it is entirely proper, the Commission urges, to deny licenses to those who broadcast them.

But this involves the determination that particular conduct of a particular person is in fact criminal. It is not the conduct itself which moves the Commission to act, but a determination that there has been a violation of Section 1304. On the basis of such a determination the Commission then imposes what this Court has termed "a penalty and sanction • • • far more drastic than" fines. *Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407, 418 (1942).

The Commission does not propose to wait for a criminal conviction, or for the initiation of a criminal prosecution. There is no reason to believe that even an acquittal after a criminal prosecution would protect a broadcaster against a contrary determination by the Commission as to the central elements of the offense involved.

The statute from which Section 1304 of the Criminal Code was derived provided that its penalties should be imposed "upon conviction thereof." The Reviser's Note explains that this was deleted upon codification "as surplusage since punishment can be imposed only after a conviction." See Title 18 U. S. C. Sec. 1304, Reviser's Note.

If the proposed Order becomes effective, there will be no necessity for a conviction before punishment is imposed.

There will be neither an indictment nor a jury trial for the accused broadcaster. All that will be necessary will be an administrative finding of fact by the Commission. Even if this might be proper if the Commission was independently empowered to supervise program content, when it seeks to rest its claim to jurisdiction on the violation of a criminal statute, the question of constitutional safeguards for those accused of crime becomes pertinent.

The Commission may suggest that a clear case of obscenity or subversion of public order would demand action by the Commission if law enforcement agencies should fail to act. Such a case can be decided if it ever arises. All that is at issue here is the Commission's power to act against the broadcast of programs which subvert neither morals nor public order, and which have been consistently considered legal by other public agencies directly charged with the enforcement of the laws.

There is no significant difference between the programs which in 1940 the Commission referred to the Department of Justice for prosecution, the programs which in 1943 it recommended be banned by statute, and the programs which it currently seeks to prohibit through the Order. The Commission has concluded that the only way to accomplish its ends is to take the enforcement of the Criminal Code into its own hands. It is forced into this position because neither the Department of Justice, the appropriate enforcement agency, nor the Congress, the appropriate legislative body, agrees with its views as to the law of lotteries.

The Commission thus is seeking to operate as a censor in the shadowland of personal judgment. It is submitted that it should not be permitted to do so.

The Commission's Views in This Field are Not Entitled to Special Respect.

The Commission's opinion as to the proper interpretation of criminal statutes prohibiting lotteries is not an opinion within the field of its expert knowledge.

The District Court pointed out:

> "This is not a case where the Court is asked to set its opinion over and above that of the Commission or of a majority of the Commission's membership. There are seven members of the Federal Communications Commission. The rules under attack were adopted by the action of only four of the members. One of the four dissented. The basis of that dissent was that there was nothing of value given by any of the participants for the chance of winning a prize. If we grant an injunction against the enforcement of Rule (b) (2), (3) and (4) we shall not be holding contra to the view of a majority of the Commission; and our decision will be in accord with opinions, concerning similar 'give-away' programs, rendered by the Attorney General in 1940 although the Attorney General now appears in support of the Commission's new rules.
>
> "These rules do not involve any of the scientific or technical problems of radio or television, or their statistical field and inter-station relationships, concerning which the Commission has expert knowledge. The Commission's opinion, although entitled to respect, is not authoritative. Interstate Commerce Comm. *v.* Service Trucking Co., 3 Cir., 186 F. 2d 400; Lincoln Electric Co. *v.* Commissioner of Int. Rev., 6 Cir., 190 F. 2d 326. We need not consider as applicable the admonition of Judge Frankfurter in National Broadcasting Co. *v.* United States, 319 U. S. 190 at page 218, 63 S. Ct. 997, 87 L. Ed. 1344, that the courts should hesitate to substitute their own views for those of the Commission in matters

> peculiarly within the knowledge and experience of the Commission. The basic question presented on these motions is the interpretation of the lottery statute, §1304, and its application to the types of programs condemned by the Commission's Rules. That is a legal question and peculiarly within the province of the courts'' (110 F. Supp. 388-9).

It is respectfully submitted that the opinion of the court below goes to the extreme limit of approving activity by the Commission in a field in which Congress gave every evidence of desiring that the Commission should not act, and which, moreover, is a field customarily and zealously protected by the courts from administrative interference because of the practical danger of restricting freedom of speech.

Conclusion.

Every consideration of both policy and law requires the affirmance of the decision below.

Respectfully submitted,

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APPENDIX A.

Text of Statutes Involved.

Communications Act of 1934, 48 Stat. 1064 (1934), as amended, 47 U. S. C. §151 *et seq.*

SECTION 4(i):

"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."

SECTION 303:

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall—

• • •

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

SECTION 307(a):

"The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter."

SECTION 308(b):

"All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any,

with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

SECTION 309(a):

"If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

SECTION 326:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Title 18, U. S. C., Crimes and Criminal Procedure, Chapter 61—Lotteries.

SECTION 1301.

"Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, cer-

tificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both."

SECTION 1302.

"Whoever knowingly deposits in the mail, or sends or delivers by mail;

Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes——

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years."

Appendix A.

SECTION 1303.

"Whoever, being a postmaster or other person employed in the Postal Service, acts as agent for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest, in or dependent upon the event of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined not more than $100 or imprisoned not more than one year, or both."

SECTION 1304.

"Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense."

SECTION 1305.

"The provisions of this chapter shall not apply with respect to any fishing contest not conducted for profit wherein prizes are awarded for the specie, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event."

APPENDIX B.

Decisions on the Legality of Bank Night and Similar Schemes.

1. Decisions Holding Bank Night and Similar Schemes Legal.

People v. *Cardas*, 137 Cal. App. 788, 28 P. 2d 99 (1933)
Affiliated Enterprises, Inc. v. *Gruber*, 86 F. 2d 958 (1st Cir. 1936)
Commonwealth v. *Wall*, 295 Mass. 70, 3 N. E. 2d 28 (1936)
Griffith Amusement Co. v. *Morgan*, 98 S. W. 2d 844 (Tex. Civ. App. 1936)*
People v. *Shafer*, 160 Misc. 174, 289 N. Y. S. 649 (Monroe Co. 1936), *aff'd mem.*, 273 N. Y. 475, 6 N. E. 2d 410 (1936)
State v. *Hundling*, 220 Iowa 1369, 264 N. W. 608 (1936)
State v. *Eames*, 87 N. H. 477, 183 Atl. 590 (1936)
State v. *Crescent Amusement Co.*, 170 Tenn. 351, 95 S. W. 2d 310 (1936)
Simmons v. *Randforce Amusement Corp.*, 162 Misc. 491, 293 N. Y. S. 745 (Mun. Ct. 1937)
Dorman v. *Publix-Saenger-Sparks Theatres, Inc.*, 135 Fla. 284, 184 So. 886 (1938)
Darlington Theatres v. *Coker*, 190 S. C. 282, 2 S. E. 2d 782 (1939)
St. Peter v. *Pioneer Theatre Corp.*, 227 Iowa 1391, 291 N. W. 164 (1940)
State ex rel. Stafford v. *Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 132 P. 2d 689 (1942)

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* There is no inconsistency between this case and those Texas decisions such as *City of Wink* v. *Griffith Amusement Co.*, *infra*, which held Bank Night illegal. In those cases the Court was convinced that there was no genuine opportunity for persons to participate without paying, while in this case "free play" was a reality. The cases agree that the test is factual—whether the patrons pay in part for their chances.

Appendix B.

Albert Lea Amusement Corp. v. *Hanson,* 231 Minn. 401, 43 N. W. 2d 249 (1950)*

2. Decisions Holding Bank Night and Similar Schemes Illegal on Ground That Money Was Paid for a Chance.

A. Cases of the gift enterprise type, with chances available only to paying patrons.

Society Theatre v. *Seattle,* 118 Wash. 258, 203 Pac. 21 (1922)

People v. *Miller,* 271 N. Y. 44, 2 N. E. 2d 38 (1936)

Shanchell v. *Lewis Amusement Corp.,* 171 So. 426 (La. Ct. App. 1936)

Sproat-Temple Theatre Corp. v. *Colonial Theatrical Enterprise, Inc.,* 276 Mich. 127, 267 N. W. 602 (1936)

United-Detroit Theatres Corp. v. *Colonial Theatrical Enterprise, Inc.,* 280 Mich. 425, 273 N. W. 756 (1937)

Commonwealth v. *Payne,* 307 Mass. 56, 29 N. E. 2d 709 (1940)

B. Free play held not to change the essential nature of the scheme but to be merely a subterfuge.

Affiliated Enterprises, Inc. v. *Gantz,* 86 F. 2d 597 (10th Cir. 1936)

State v. *McEwan,* 343 Mo. 213, 120 S. W. 2d 1098 (1938)

State v. *Schubert Theatre Players Co.,* 203 Minn. 366, 281 N. W. 369 (1938)

State ex rel. Cowie v. *La Crosse Theaters Co.,* 232 Wis. 153, 286 N. W. 707 (1939)

State v. *Jones,* 44 N. M. 623, 107 P. 2d 324 (1940)

Kessler v. *Schreiber,* 39 F. Supp. 655 (S. D. N. Y. 1941)

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*The Commission's brief considers this case irreconcilable with the earlier decision of *State* v. *Schubert Theatre Players Co., infra.* The answer is simply that, while both opinions agree that the test of legality was whether the patrons paid in part for the chance, the difference in the facts of the two Bank Night schemes led to the different results.

Appendix B.

C. Patrons paying admission held to have paid in part for a chance.

State v. *Danz,* 140 Wash. 546, 250 Pac. 37 (1926)
City of Wink v. *Griffith Amusement Co.,* 129 Tex. 40, 100 S. W. 2d 695 (1936)
Jorman v. *State,* 54 Ga. App. 738, 188 S. E. 925 (1936)
Iris Amusement Corp. v. *Kelly,* 366 Ill. 256, 8 N. E. 2d 648 (1937)
State v. *Stern,* 201 Minn. 139, 275 N. W. 626 (1937)
State ex rel. Hunter v. *Fox Beatrice Theatre Corp.,* 133 Neb. 392, 275 N. W. 605 (1937)
Cole v. *State,* 133 Tex. Cr. R. 548, 112 S. W. 2d 725 (Tex. Cr. App. 1938)
State v. *Robb & Rowley United,* 118 S. W. 2d 917 (Tex. Civ. App. 1938)
Commonwealth v. *Heffner,* 304 Mass. 521, 24 N. E. 2d 508 (1939)
McFadden v. *Bain,* 162 Ore. 250, 91 P. 2d 292 (1939)
Commonwealth v. *Lund,* 142 Pa. Super. 208, 15 A. 2d 839, *allocatur refused,* 142 Pa. Super. xxxi (Super. Ct. 1940)
Commonwealth v. *McLaughlin,* 307 Mass. 230, 29 N. E. 2d 821 (1940)
State v. *Omaha Motion Picture Exhibitors Ass'n.,* 139 Neb. 312, 297 N. W. 547 (1941)

D. Participants viewed collectively held to have paid for a chance.

Willis v. *Young,* [1907] 1 K. B. 448
Barker v. *State,* 56 Ga. App. 705, 193 S. E. 605 (1937)
Affiliated Enterprises, Inc. v. *Waller,* 1 Ter. 28, 5 A. 2d 257 (Del. Super. 1939) (Held that participants as a group contributed to fund; also stating, however, that contract consideration would be enough.)
Little River Theatre Corp. v. *State ex rel. Hodge,* 135 Fla. 854, 185 So. 855 (1939)

E. Patrons who, as indicated by increased gate receipts, would not have attended but for the Bank Night, held to have paid for a chance.

Central States Theatre Corp. v. *Patz,* 11 F. Supp. 566 (S. D. Iowa 1935)

Grimes v. *State,* 235 Ala. 192, 178 So. 73 (1938)

Stern v. *Miner,* 239 Wis. 41, 300 N. W. 738 (1941) (consideration furnished both by the additional paying patrons who paid for chance, and by others who stood outside)

State ex rel. Draper v. *Lynch,* 192 Okla. 497, 137 P. 2d 949 (1943)

3. Decisions Holding Bank Night and Similar Schemes Illegal on Grounds Other Than Payment of Money for the Chance.

State ex rel. Beck v. *Fox Kansas Theater Co.,* 144 Kan. 687, 62 P. 2d 929 (1936) (benefit to theater owner)

State v. *Dorau,* 124 Conn. 160, 198 Atl. 573 (1938) (Connecticut statute dispenses with consideration)

State v. *Wilson,* 109 Vt. 349, 196 Atl. 757 (1938) (Court approved cases finding consideration in money payment for chance, but found it necessary to adopt contract consideration theory because of a failure of the indictment to allege that theatre admission prices were in fact paid by anyone)

State ex rel. Dussault v. *Fox Missoula Theatre Corp.,* 110 Mont. 441, 101 P. 2d 1065 (1940) (Expressly overruled by *State ex rel. Stafford* v. *Fox-Great Falls Theatre Corp., supra*)

Troy Amusement Co. v. *Attenweiler,* 64 Ohio App. 105, 28 N. E. 2d 207, *aff'd,* 137 Ohio St. 460, 30 N. E. 2d 799 (1940) (benefit to theater owner)

Furst v. *A. & G. Amusement Co.,* 128 N. J. L. 311, 25 A. 2d 892 (Ct. Err. & App. 1942) (benefit to theater owner, detriment to participants, and payment by some for chance).